Supreme Court, U.S.
FILED
SEP 19 1991
OFFICE OF THE CLERK

(3)

No. 91-286

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PHILLIP A. BISHOP,

Petitioner

v.

O. H. DELCHAMPS, JR., ET AL.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MICHAEL W. MCCONNELL*
MARK I. LEVY
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603
(312) 701-7201

DAVID M. SMOLIN
Southern Center for
Law & Ethics
P.O. Box 380113
Birmingham, AL 35238
Of Counsel

ALBERT L. JORDAN
TIMOTHY S. RITCHIE
Wallace, Brooke & Byers
2000-A SouthBridge Pkwy.
Birmingham, AL 35209
** Counsel of record*

13

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: *Page*

Cohen v. California, 403 U.S. 15 (1971) 3

Connick v. Myers, 461 U.S. 137 (1983) 7

Lee v. Weisman, No. 90-1014 4

Martin v. City of Struthers, 319 U.S. 141 (1943) 3

Tinker v. Des Moines Independent Community School District, 399 U.S. 503 (1969) 6

Widmar v. Vincent, 454 U.S. 263 (1981) 2

Miscellaneous:

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NwU L. Rev. 1 (1986) 3

REPLY BRIEF FOR PETITIONER

Respondents have many interesting — even radical — things to say in defense of their power to censor unwelcome viewpoints in the classroom and in out-of-class meetings between professors and students. Respondents dismiss this Court's statements about academic freedom as "rhetoric" (Brief in Opposition ("Br. in Opp.") 19, 21) and embrace, unflinchingly, even the most extreme propositions put forward by the decision below. This is not the occasion to determine whether any of respondents' arguments are right. But the Brief in Opposition only confirms that this is a case of grave importance for the free speech rights of professors at public universities. If respondents' arguments *are* right, then university administrators have not only the power but the duty to "protect" the students from "inappropriate" viewpoints — and academic freedom in the classroom is stripped of legal protection. The Brief in Opposition thus stands as an argument in favor of granting the Petition.

1. It is startling to read (Br. in Opp. 5) that "the University operates on the premise that its faculty members . . . will refrain from using their positions as faculty members to advance their personal views, whether political, social, or religious." This may be true in Albania, but it cannot possibly be true in Alabama. In fact, professors at the University of Alabama are free (as they are at other American universities) to "divulge personal views in the classroom as long as they are not disruptive of classroom activities." Pet. App. A31. This case is about discrimination against a particular opinion or viewpoint — Professor Bishop's religious viewpoint. As the record shows (and respondents do not deny), Professor Bishop's "occasional comments" in class do not differ from the expressions of other faculty members on political, social, or other subjects in any respect but one: his viewpoint is religious. Respondents are driven, therefore, to defend one of two heroic positions — either there is no academic freedom for the expression of personal and professional opinion in the classroom, or the

University is permitted to discriminate against one particular point of view.

2. Respondents' defense of viewpoint discrimination is based on a supposed obligation under the Establishment Clause to ensure that no religious comments — even "occasional" ones — reach the ears of students in the classroom. If this argument is true, the universities in America have a mighty task of censorship in front of them, which few (if any) have recognized.

The Establishment Clause limits the power of the government, not the speech of the citizens. Respondents' Establishment Clause argument (Br. in Opp. 9-13) is based on the presupposition that Professor Bishop is the government for purposes of the First Amendment — that his speech is the speech of the State. They analyze *his* purpose, and say that it is not secular (*id.* at 10-11). They analyze the effect of *his* statements, and say that they advance religion (*id.* at 11-12). Our position, by contrast, is that university professors are *not* mouthpieces for the State. They are independent professionals with academic freedom rights recognized under both the regulations of the University and the Free Speech Clause of the First Amendment. The correct question under the Establishment Clause, therefore, is whether the *University* has a secular purpose, and whether the effect of the *University's* actions is to advance religion. Cf. *Widmar v. Vincent*, 454 U.S. 263, 271-75 (1981) (focusing Establishment Clause analysis on the University's purposes and actions, not on those of individual student speakers). As the district court held (Pet. App. A36), this is not a close or difficult question. The University's purpose in allowing its professors to teach without interference or censorship is to promote free exchange and scholarship. The effect of this policy is to bring a diversity of views to the attention of its students, without favoring religion over nonreligion, or nonreligion over religion.[1]

---

[1]On the entanglement issue, the "University would be forced, on an ongoing basis, to monitor Bishop's comments" (Br. in Opp. 12) only if the

Respondents make a colorable Establishment Clause argument only by assuming that what is said in the classroom is attributable to the State. See Br. in Opp. 12-13. This assumes there is no right of academic freedom in the classroom, for if the various professors in the various classrooms of the University are teaching from their various points of view, it follows that no reasonable person could conclude that any of them is speaking for the University.[2] Whether academic freedom is protected by the First Amendment (as we contend) or is merely protected by University regulation (as respondents concede), the result is the same: the professor's speech is *free* and is not subject to the limits on *government power* that are imposed under the Establishment Clause. See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,* 81 Nw. U.L. Rev. 1 (1986).

3. Even if respondents are correct that Professor Bishop's words are the words of the State for purposes of Establishment Clause analysis, it would not follow that his optional lecture or the "occasional comments" he makes in class would violate the Establishment Clause. Under the facts of the case as determined by the district court and accepted by the court of appeals, Bishop's comments did not "rise to th[e] level" of "coercion" or even of "proselytiz[ing]." Pet. App. A27, A32. The court doubted "that [Bishop's] minimal comments exert influence on the religious beliefs of college or graduate students" (*id.* at A36). If this Court were to conclude that respondents' arguments about the Establishment Clause have a bearing on the certworthiness of this case, it should, at a minimum, hold

---

University's censorship of Professor Bishop's speech is upheld. If his academic freedom is upheld, there will be no need for "monitoring."

[2]This explains why the principles are different for universities than for elementary and high schools. Students in elementary and high school are vulnerable to indoctrination and would not perceive the comments of the teacher as being merely his own opinion. This is partly because of the age of the students and partly because the traditional function of the elementary and high schools is to inculcate community values.

the petition for consideration in light of *Lee v. Weisman*, No. 90-1014.

4. Respondents further claim that even if petitioner has First Amendment rights, they must be "balanced" against the rights of the students to be shielded from hearing his views. Br. in Opp. 14-15. This line of reasoning has long been rejected by this Court. See *Martin v. City of Struthers*, 319 U.S. 141 (1943). To allow the government "to shut off discourse solely to protect others from hearing it" would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971). Under a regime of academic freedom, the students have a First Amendment right to hear viewpoints the government may deem "inappropriate." This right is complementary to the professor's right to speak. Far from "protecting " the students' First Amendment rights (Br. in Opp. 26), the University violates them when it attempts to filter out unconventional points of view.

In this respect, religious viewpoints are not different from any other viewpoints students might find irritating or provocative. Indeed, respondents take the position that students should be protected from all of the "personal views" of the faculty "whether political, social, or religious" (Br. in Opp. 5).

5. Respondents argue that academic freedom belongs to the institution and not to the individual instructor, who has few if any rights in the classroom. Br. in Opp. 16-22. In support of this proposition, they cite law review articles by two distinguished academicians. *Id.* at 16-19, 21. We are not unaware of the scholarly debate. Indeed, we cited yet another scholar taking a similar position (Pet. 20), along with two scholars supporting our position (Pet. 16, 20). That the issue is a subject of intense debate in the scholarly literature only underscores its importance.

Respondents can hardly claim that their position is widely accepted; indeed, they have to explain away many statements in this Court's opinions as "rhetoric" (Br. in Opp. 19, 21) and

were not able to find a state or lower court opinion supporting their position in the university context. The decision below is in clear conflict with the weight of authority on this point.[3]

6. Respondents attempt to portray petitioner's position as "establish[ing] an absolute right for faculty members to speak [in the classroom] about whatever they wish" (Br. in Opp. 9). In the Petition, however, we take pains to explain that in petitioner's view, the University has the right to set the curriculum, evaluate the professional competency of the faculty, and ensure that extraneous remarks do not consume so much time that coverage of the material suffers, that the professor's comments be nondisruptive, and that the comments be noncoercive. Pet. 28-29. Our position is simply that University administrators must exercise these powers in a viewpoint-neutral way, not singling out particular viewpoints or ideologies for special regulation, and that within the limits so established, professors have the right to express their personal and professional opinions in the classroom even if administrators think those opinions are "inappropriate."

7. The Brief in Opposition makes numerous claims about the University's interests in controlling faculty speech, which if they are references to the facts of this case are clearly contradicted by the record.

---

[3]Respondents make the carefully-worded claim that "[n]one of the cases cited by petitioner squarely hold that a professor, in the context of a university class, has the right to interject comments about personal beliefs unrelated to the subject matter over the well-founded objection of administrators" (Br. in Opp. 19). As respondents concede, however, Professor Bishop's opinions "may be derived or inferred from the conclusions Bishop draws from his study of the assigned subject matter" (*id.* at 9 n.6). Respondents do not deny that cases recognizing academic freedom at the high school level apply *a fortiori* at the university level. And by definition, none of the cases treat unconstitutional interference with academic freedom as "well-founded." Other than this thrice-meaningless comment, respondents do not deny that the decision below is in conflict with numerous lower court decisions, cited in the Petition at 18-19.

(a) Respondents claim (Br. in Opp. 18) an interest in ensuring that the students' right to "receiv[e] instruction for which they had paid" is not thwarted by a professor who "spend[s] class time discussing at his whim such things as his religious beliefs." Petitioner does not deny this interest, but contends that it must be enforced evenhandedly, without discrimination as to viewpoint. In this case, it is undisputed that all petitioner's comments, put together, never exceeded five minutes over the course of a semester, and that other professors at the University spend this much time or more on matters not directly related to the curriculum. Petitioner himself retains the freedom to spend class time talking about movies, sports, politics, or other subjects. The directive does not refer to the *quantity* of petitioner's comments, but to their "Christian perspective." Pet. App. A35. This suggests that this purported justification for the University's order is a sham.

(b) Respondents assert that Professor Bishop's classroom comments were "wholly unrelated to his assigned subject," suggesting that this removes them from the protections of academic freedom. Br. in Opp. 9. Two pages later they note that the optional lecture was "directly connected to the classes assigned to Bishop" (*id.* at 11) — this time making the opposite argument that the connection to his classes renders the speech vulnerable to regulation.

We do not know what difference any of this makes, since other professors are free to make comments unrelated to their subject matter, and some of the most important First Amendment cases in the academic freedom area involve nongermane speech. See *Tinker v. Des Moines Independent School Dist.*, 399 U.S. 503 (1969). But for the record, most of petitioner's comments did relate to his assigned subject. Certainly his comments about coping with academic stress were relevant to his work with graduate students on thesis research.[4] His com-

---

[4]Professor Bishop teaches a course for graduate students entitled "Dissertation and Thesis Research." Deposition of Phillip A. Bishop (March 14, 1989) at 45.

ments about intelligent design "may be derived or inferred from conclusions Bishop draws from his study of the assigned subject," as respondents concede (Br. in Opp. 9 n.6). And the optional after-class meeting was based on "technical material" covered in graduate physiology courses (Bishop Dep. at 39). The court of appeals clearly stated that the University's order applied "even to the extent it represents [petitioner's] professional opinion about his subject matter" (Pet. App. A20). Respondents' attempt to rewrite the question presented as involving solely "personal" beliefs (Br. in Opp. i) — whatever that means — is a mischaracterization of the holding below.

(c) Respondents warn that an individual faculty member must not be allowed to "override[] collective judgments about curricular content" (Br. in Opp. 25). But it is undisputed that petitioner taught the assigned curriculum. The case is not about choice of curriculum, but about the professor's right to express personal and professional opinions within the assigned curriculum.

(d) Respondents continue to claim that petitioner's speech was "coercive" (Br. in Opp. 9, 27). But the district court expressly rejected this allegation (Pet. App. A37, A36).[5]

(e) Finally, the University seeks to portray Professor Bishop's comments as dogmatic utterances "conveyed as unquestionable truth" (Br. in Opp. 10). Nothing could be further from the truth. Even the court of appeals acknowledged that "Dr. Bishop's efforts to identify a personal bias, present it to his students, and hold it up for criticism are admirable" (Pet. App. A18 n.7). As a constitutional principle, we would

---

[5]This finding was not contradicted by the court of appeals. To be sure, that court stated that it was taking into consideration "the coercive effect upon students that a professor's speech *inherently* possesses" (Pet. App. A16, emphasis added). This was not a finding that Professor Bishop's speech, in particular, was coercive, but that all classroom speech is coercive. We strongly take issue with this conclusion (Pet. 23), but it does not help respondents here. If *all* classroom speech by faculty is coercive, this can provide no reason to single out Professor Bishop.

note that even dogmatic professors are entitled to freedom of speech. But as a factual matter this charge is unfounded and unfair.[6]

8. Respondents defend the so-called "balancing approach" of the court of appeals (Br. in Opp. 22-25). But they make no reference to the most objectionable feature of the court's approach: its reduction of the level of protection for academic speech to the lowest level of scrutiny (Pet. App. A15, A16, A19, A20, A24), even when the University officials have engaged in viewpoint discrimination (Pet. App. A10, A20).[7] Moreover, the key element in the court's balance was the University's supposed "interest . . . in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur'." Pet. App. A13 (brackets in original). A "balance" conducted under these terms is constitutionally defective, for the reasons set forth in the Petition (at 11-14). Conspicuously, respondents do not deny that under the reasoning of the court of appeals, a University would be able to suppress the expression of other views (Maxism, feminism, opposition to affirmative action, support for the Contras) that the public might also perceive as being objectionable, as pointed out in the Petition (at 13-14, 29). Surely such a decision cannot be allowed to stand without searching review by this Court.

---

[6]It is also *post hoc*. The administrators did not even know the precise content of Professor Bishop's comments until after they had issued the order. Deposition of Carl Westerfield (Jan. 5, 1989) at 29.

[7]Respondents' claim that academic freedom rights are no greater than the rights of public employees is addressed at Pet. 22-23. But it is particularly absurd to argue that the professor's free speech right only applies to matters of "public concern." Br. in Opp. 22-24; cf. *Connick v. Myers*, 461 U.S. 137 (1983). If "public concern" is used in the narrow sense of pertaining to government or public life, most of what goes on in the university classroom falls outside that category. If "public concern" is interpreted more broadly, the exchange of ideas in the university setting is inherently a matter of public concern — *no matter what the subject matter happens to be*. It may be that some speech by faculty (gossip in the faculty lounge, griping about poor pay) is analogous to the speech in *Connick*, but speech in the classroom is not.

9. Finally, respondents fall back on a plea that this Court defer to "the institution's professional judgment" (Br. in Opp. 21). In some cases, that might be well taken. But respondents spent the first half of their brief telling us that their decision to censor Professor Bishop was compelled by the Establishment Clause. The administrators themselves had treated the question as a "legal issue" (Roth Dep. 20, 36), and had based their decision on advice of counsel, who told them they had a "duty" to "control this kind of activity." Westerfield Dep. Exh. 10. They cannot now escape judicial scrutiny by claiming that this is a pedagogical issue. Petitioner's superiors have engaged in naked viewpoint discrimination, and all possible neutral explanations have been examined and refuted by the lower courts. The court of appeals has rendered a far-reaching opinion eliminating constitutional protection for academic freedom in the classroom, applicable to political and social, as well as religious speech. This is no time for deference. It is time for reaffirmation of fundamental principles of constitutional law.

CONCLUSION

For the reasons stated in the Petition and those stated above, the Petition should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL*
MARK I. LEVY
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603
(312) 701-7201

DAVID M. SMOLIN
Southern Center for
Law & Ethics
P.O. Box 380113
Birmingham, AL 35238
Of Counsel

ALBERT L. JORDAN
TIMOTHY S. RITCHIE
Wallace, Brooke & Byers
2000-A SouthBridge Pkwy.
Birmingham, AL 35209
** Counsel of record*

SEPTEMBER 19, 1991